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No. 86-352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEVIN ELWOOD KRZYSKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

MICHAEL M. USHIJIMA
6300 North River Road
Suite 100
Rosemont, Illinois 60018
(312) 696-3466
Counsel for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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No. 86-352

Kevin Elwood Krzyske, Petitioner

v.

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RESPONSE TO THE GOVERNMENT'S BRIEF IN OPPOSITION

I. This matter properly is before the Court.

A. CASE AND CONTROVERSY

This petition for certiorari presents the unsettled question of what unspecified conditions are proper regarding release pending appeal under the Bail Reform Act of 1984. This is a real controversy.

As the record shows, petitioner initially was granted release pending appeal. Certain novel conditions, however, were imposed by the District Court. The first condition prohibited the defendant from discussing certain matters with anyone but his attorney. This condition was found to be an unconstitutional prior restraint by the Court of Appeals for the Sixth Circuit. The conditions directing petitioner 1) to file certain tax returns and 2) to pay any and all tax due thereon were affirmed. The petitioner did not comply by the expiration of the period established by the order of the Court of Appeals. In fact, the petitioner stated in open court that he could not comply with the conditions as they related to payment of any and all taxes due. The

District Court subsequently entered an order requiring petitioner to be detained unconditionally. Petitioner motioned for stay of such conditions before the District Court. That motion was denied. Petitioner voluntarily submitted to custody and remains incarcerated presently.

The District Court explicitly and implicitly found that the petitioner was not likely to flee and did not pose a danger to the community when the court granted release pending appeal of petitioner's conviction. This order was burdened only by the three conditions, one of which was found to be unconstitutional. If the other conditions were improper, then petitioner was entitled to bail and the petitioner's challenges are not moot.

II. The Conditions Imposed Upon Release were Improper ab initio.

A. ISSUE

At the heart of this petition are the issues of 1) whether the District Court Order establishing specific novel conditions to release pending appeal was proper, and 2) whether the petitioner's noncompliance with those conditions properly were used as the court's basis for ordering unconditional detention.

B. THE PETITIONER'S EIGHTH AMENDMENT RIGHT AGAINST EXCESSIVE BAIL

The Eighth Amendment prohibits excessive bail and it has been applied to matters where a defendant has been found entitled to bail. See United States v. Giangrasso, 763 F.2d 849 (7th Cir. 1985). The District Court clearly found that

petitioner 1) was entitled to release pending appeal; 2) was not therefore a danger to the community; and 3) was not likely to flee the jurisdiction.

How then do the requirements that petitioner file tax returns and pay any and all tax due thereon further the ends of the Bail Reform Act? In light of the fact that petitioner could not comply with both conditions, that the district court was apprised of the circumstances and that such conditions were not reasonably related to the ends of conditional release, the order was improperly excessive and violative of petitioner's Eighth Amendment right to reasonable bail.

C. THE BAIL REFORM ACT OF 1984 AND ITS LIMITATIONS UPON THE DISTRICT COURT

The District Court subsequently imposed conditions to release pending appeal not contemplated by the Bail Reform Act. A defendant, once found to be entitled to release by the court, can be subjected to any conditions to release that are related reasonably to 1) the likelihood of flight and 2) the safety of the community. The initial order of the District Court promotes neither end as petitioner was found not to present a threat to the safety of the community and not likely to flee the jurisdiction. The subsequent order for unconditional detention therefore was tainted by the improper conditions set in the former order.

Further, petitioner notes that even assuming arguendo, as the brief in opposition contends, that sufficient ground for unconditional detention exists, no such findings by the District Court in support of such detention were ever made. On the contrary, petitioner was found to be entitled to release pending appeal. With regard to such a finding petitioner has a due process right to require any novel conditions to said release to be related reasonably to the purposes of the Bail Reform Act. These substantive issues properly are raised before this Court.

III. Conclusion.

The issues presented to this Court are actual controversies not settled and for which petitioner is entitled to

relief. The brief in opposition clearly attempts to avoid the merits of the issue relating to the scope of the reasonable conditions authorized by the Bail Reform Act of 1984. The brief in opposition fails to cite any decisions in support of its argument. This can be attributable in part to the fact that the status of the law regarding the Bail Reform Act of 1984 is uncertain.

The District Court's orders should be reversed as neither the order establishing conditions of release nor the order establishing detention are founded upon law or fact. The petition for certiorari therefore should be granted.

Respectfully submitted,

MICHAEL M. USHIJIMA
Counsel for Petitioner